

**From:** Mark Herrick  
**To:** Microsoft ATR  
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**Subject:** Microsoft

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Dear Judge Kollar-Kotally:

The Court should disallow, in its current form, the proposed settlement between the U.S. Department of Justice and Microsoft in U.S. v. Microsoft (hereinafter referred to as the "Agreement"). There are two main reasons this Court should disallow the Agreement.

- 1) The Agreement completely ignores the standard laid down by the D.C. Appellate Court.
- 2) The Agreement runs contrary to the public interest of the people of the United States and therefore should be held in violation of the Tunney Act.

I. The Agreement fails to meet the Appellate Court's Remedy Standards. The United States Court of Appeals for the District of Columbia (hereinafter referred to as the "Appellate Court") in a 7-0 decision upheld the District Court's decision that Microsoft violated the antitrust laws and was liable for such illegal conduct. The Appellate Court further ruled that any remedy found by the District Court must "terminate the monopoly, deny to Microsoft the fruits of its past statutory violations, and prevent any future anticompetitive activity." The Agreement fails to meet any of these three standards.

A. Terminate the Monopoly. The deal fails to terminate the Microsoft monopoly, and instead guarantees Microsoft's monopoly will survive and be allowed to expand into new markets. All other businesses in the U.S. market that have a ninety percent market share are considered per-se monopolies and are regulated or have some sort of government oversight (i.e. utilities, local phone companies, cable companies etc.). This is done because it is in such a company's best interest (in the interest of their shareholders) to abuse their position. In other words, to gain maximum shareholder value, they are almost required to abuse their position. Why is Microsoft allowed a waiver to this general rule? Does Microsoft not try to gain optimum share value for their shareholders?

B. Deny to Microsoft the Fruits of its Past Statutory Violations. Under the Agreement, Microsoft is not penalized for any past misdeeds. In other words, they are being allowed to retain all the profits gained from their illegal activities. Every court involved with this case has acknowledged that Microsoft broke the anti-trust laws. Through this Agreement, the Justice Department is sending the message that this sort of anticompetitive behavior is acceptable. Every large potential monopolistic company is being told that they can get away with this sort of illegal behavior without fear of losing any of the gains made from such conduct. In other words, get away with as much as you can until the Justice Department brings an action. There is every incentive for future monopolists (including Microsoft) to engage in this type of predatory conduct and no incentive not to.

C. Prevent any Future Anticompetitive Activity. The Agreement fails to prevent any future anticompetitive activity because it completely ignores anticompetitive behavior highlighted by the Appellate Court. In addition, for the conduct the Agreement does try to remedy, it creates such huge loopholes to the rules it does establish as to render them completely useless. Lastly, the Agreement provides no effective enforcement mechanism for the rules it does establish.

1. The Agreement Does Not Address Anticompetitive behavior identified by the Appeals Court.

a) Retaliation. The settlement does not address Microsoft ability to retaliate against would-be competitors and to take the intellectual property of competitors doing business with Microsoft. The Appeals court found such past conduct by Microsoft highly egregious yet the Agreement does not address these issues.

b) Bolting. The Agreement does not address the issue that fueled consumer criticism and which gave rise to this antitrust case in 1998: Microsoft's decision to bind - or "bolt" - Internet Explorer to the Windows operating system in order to crush its browser competitor Netscape. This settlement gives Microsoft "sole discretion" to unilaterally determine that other products or services which don't have anything to do with operating a computer are nevertheless part of a "Windows Operating System product."

This creates a new exemption from parts of antitrust law for Microsoft and would leave Microsoft free to bolt financial services, cable television, or the Internet itself into Windows.

2. The Agreement Incorporates Such Large Loopholes to Its Restrictions on Microsoft as to Render Such Restrictions Useless.

a) Middleware. As part of the Agreement, Microsoft is required to allow the PC manufacturers to hide Microsoft middleware programs and allow them to install icons or links to competing middleware programs. The only problem is that the PC manufacturers are not allowed to remove the code that could be used to reactivate Microsoft's middleware programs. In other words, two weeks into owning the machine, a consumer could be asked if they want to reconfigure their desktop, install all the Microsoft middleware and delete all the competitor's middleware.

b) Communication Protocols. The Agreement states that Microsoft must now share information on how its middleware and server software work together with Windows. However, Microsoft does not have to disclose this information for middleware it does not distribute separate from windows, or for middleware it has not trademarked. In addition, Microsoft does not have to disclose this coding information if Microsoft deems such disclosure would harm the company's security or software licensing.

(1) Software it Does Not Distribute Separate from Windows. This is a huge loophole of "Bolting" that was discussed above. If Microsoft wants to drive a competitor out of business, they just attach the specific type of software the competitor is involved with to their Windows platform. Once they do that, they do not have to share the coding information that allows the competitors software to work with Windows, thus driving the competitor out of business. Once the competitor is out of business, Microsoft can separate the software from the Windows package, sell it separately and derive huge margins.

(2) Viable Business. Microsoft does not have to disclose their information to companies that in "their view" do not have a "viable business". This loophole will allow Microsoft to prevent new software start-ups from forming because Microsoft could decide they are not a "viable business". Who can really say which new start-ups is a "viable business"? Preventing new companies from starting is undeniably bad for competition, and therefore, the consumer.

(3) Harm to Company's Security or Software Licensing. Microsoft does not have to share coding information if they believe that such disclosure would cause harm to the Company's security or software licensing. There is no provision to say who is to make this determination so it is clearly up to Microsoft. Could not Microsoft make the argument that sharing coding with any software or P.C. Manufacturer would endanger its security of software licensing?

c) Bribing Competitors. The Agreement states that Microsoft "shall not enter into any agreement" to pay a software vendor not to develop or distribute software that would compete with Microsoft's products. However, another provision in the Agreement permits those payments and deals when they are "reasonably necessary." Who is the ultimate arbiter of when these deals would be "reasonably necessary"? The Agreement does not specify so Microsoft will be allowed to make that decision.

3. The Agreement Does Not Provide an Effective Enforcement Mechanism for the Weak Restrictions it does Implement. The Agreement requires a three-man compliance team to oversee Microsoft's compliance with the Agreement. Microsoft will appoint one person, the Justice Department another, and the third will be chosen by the two people already appointed. In essence, Microsoft will control half the team. This new team will not be allowed to inform the public of their work, and cannot impose fines. In addition, the work of the committee cannot be admitted into court in any enforcement proceeding. The committee's sole remedy for infractions is for them to inform the Justice Department of the infraction and then the Justice Department will have to conduct their own research and commence litigation to stop the infraction. The Justice Department does not need a compliance group to tell them when Microsoft is doing something wrong, so in reality this group is just a smoke screen.

II. Violation of the Tunney Act. The Tunney Act clearly states that the court should disallow any agreement between an anti-trust violator and the

Justice Department if such agreement is ?contrary to the public interest?. It is hard to imagine an Agreement that would violate the public trust more than the proposed Agreement. How could an agreement that ignores all three required remedies laid down by the Appellate court to remedy the situation (terminate the monopoly, deny to Microsoft the fruits of its past statutory violations, and prevent any future anticompetitive activity) possibly be within the public interest. If this Agreement is upheld and then appealed, how could the Appellate Court approve this agreement when it directly violates its own mandate. It would have to find this Agreement to be in direct violation of its own mandate and the public interest. The Appellate Court's decision needs to be respected and this Agreement must be found void.

Thank you for your attention to this matter, and should you have any questions about the above letter please feel free to contact me at any time.  
Sincerely yours,

Mark Herrick

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